THE REPUBLICAN STUDY COMMITTEE
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Legislative Bulletin……June 28, 2012

Contents:

H. Res. __ – Resolution recommending that the House of Representatives find Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, in contempt of Congress for refusal to comply with a subpoena duly issued by the Committee on Oversight and Government Reform (Issa, R-CA)

Order of Business: The rule provides that all points of order against the committee report shall be waived and it shall be considered as read. The resolution shall be considered under a closed rule. 50 minutes of debate shall be provided equally divided and controlled by the chair and ranking minority members of the Committee on Oversight and Government reform. The rule allows one motion to refer for a motion offered by Rep. Dingell of Michigan, which shall be debatable for 10 minutes equally divided and controlled by the proponent and an opponent.

Summary: This Report of the Committee on Oversight and Government Reform would hold Attorney General Eric Holder in contempt of Congress for his refusal to turn over documents and other materials necessary for Congress to investigate the Department of Justice (DOJ) activities after the "Fast and Furious" operation.

From the Committee's Executive Summary:

> "The Department of Justice has refused to comply with Congressional subpoenas related to Operation Fast and furious, an Administration initiative that allowed around two thousands firearms to fall into the hands of drug cartels and may have led to the death of a U.S. Border Agent. . .The Department's refusal to work with Congress to ensure that it has fully complied with the Committee's efforts to compel the production of documents and information related to this controversy is inexcusable and cannot stand.

> Those responsible for allowing Fast and Furious to proceed and those who are preventing the truth about the operation from coming out must be held accountable for their actions."
>
> "Having exhausted all available options in obtaining compliance, the Chairman of the Oversight and Government Reform Committee recommends that Congress find the Attorney General in contempt for his failure to comply with the subpoena issued to him."

According to the committee, the DOJ has denied investigators more than 90% of all the documents that have been identified as related to Operation Fast and Furious, and the DOJ has directed witnesses not to answer entire categories of questions.

Remaining Questions for the Department of Justice According to the Committee:

1. *How did the Justice Department finally come to the conclusion the Operation Fast and Furious was "fundamentally flawed"?*

- On February 4, 2011, the Department of Justice denied whistleblower allegations that guns in Operation Fast and Furious had been allowed to "walk" to Mexico and defended the operation itself. Ten months later, on December 2, 2011, the Justice Department formally withdrew the denial and acknowledged that Fast and Furious was "fundamentally flawed." In responding to Congress, however, the Justice Department has taken the position that it will not share its internal deliberations related to Operation Fast and Furious.
    - The Committee report explains that, "While the Department of Justice claims that divulging this information would have a 'chilling effect on future internal deliberations', virtually any agency could use this bland argument on nearly any topic. Congress, under both Democratic and Republican leadership, has never recognized internal agency discussions as privileged and protected."
    - Important questions remain about how the DOJ switched its view from denying whistleblower allegations to admitting them, and hiding the identity of officials who retaliated against the whistleblowers.

2. *Which senior officials at the Department of Justice were told about or approved the controversial gun walking tactics that were at the core of the operation's strategy?*

- The Committee claims that this operation "was the Justice Department's flagship arms trafficking investigation for a year and a half." Further, it was designated as part of the Department's Organized Crime Drug Enforcement Task Force program, under the control of the Arizona U.S. Attorney's office, which also allowed them to use wiretaps which by law required senior headquarters officials to review.

Remaining Documents to be Released (according to Senator Grassley):

1. "At least 281 Reports of Investigation (ROIs), drafted by the Bureau of Alcohol, Tobacco, and Firearms and Explosives (ATF) agents, including the "smoking gun" ROI referred to by then-Acting Director Kenneth Melson in his July 4, 2011, transcribed interview with congressional investigators.
2. Fast and Furious Case Management Log, October 31, 2009 – January 19, 2011.
3. All Fast and Furious Operational Plans.
4. Six wiretap application summaries written by DOJ's Office of Enforcement Operations (OEO) and provided to Deputies Assistant Attorney General for approval to forward wiretap affidavits to the court.
5. FBI 302s (Investigative Summaries) from 2010 provided by the ATF case agent to ATF Headquarters after the indictments relating to individuals who other law enforcement agencies knew had been purchasing weapons from Fast and Furious targets.
6. The file maintained by the ATF case agent, which she referred to while being surreptitiously recorded without her knowledge. She claimed on the tapes that the file was for her protection and that if any agency were to be sued over the case, it would be the FBI.
7. December 16, 2010 e-mails from the Group Supervisor to the SAC and the ASAC regarding charging Fast and Furious straw purchaser Jaime Avila, including not charging Terry murder weapons to Avila ''so as to not complicate the FBI's investigation.'
8. December 2, 2009 briefing paper and list of investigative steps taken, e-mailed up the chain from the case agent to the Deputy Assistant Director (DAD).
9. January 2010 e-mails from Special Agent in Charge (SAC) regarding license plate recognition in Fast and Furious.
10. January 2010 e-mails from Assistant Special Agent in Charge (ASAC) regarding approval of Organized Crime Drug Enforcement Task Force (OCDETF) proposal.
11. February 5, 2010 cover memorandum requesting authorization for Title III wiretap, emailed from the SAC to the DAD.
12. February 2010 e-mails between the SAC and the ASAC regarding evidence of straw purchasing.
13. March 5, 2010 PowerPoint presentation given at ATF headquarters with DOJ Criminal Division representatives present.
14. March 2010 e-mails between the Group Supervisor and the FBI Assistant General Counsel regarding placing straw purchasers on National Instant Criminal Background Check System (NICS) watch list.
15. March 2010 e-mails between the Group Supervisor and ATF intelligence analysts regarding ATF Phoenix providing case information to headquarters.
16. March and April 2010 e-mails between the Group Supervisor and others regarding wiretap affidavit and U.S. Attorney's office delay.
17. April 2010 e-mails from the Group Supervisor to El Paso, Texas law enforcement regarding Fast and Furious connections to Texas April 2010 e-

mails between the Group Supervisor and ATF intelligence division regarding border crossings of straw purchasers.
18. July 2010 e-mails from the SAC regarding State Department cable and impact of Fast and Furious on international trafficking situation.
19. March and April 2010 e-mails between the Group Supervisor and Special Operations Division regarding GPS tracker for insertion into one firearm.
20. December 22, 2010 e-mail restricting access to Fast and Furious case file to limited group.
21. January 4, 2011 e-mail from the SAC regarding talking points for the Deputy Assistant Director.
22. January 26, 2011 e-mail from the Assistant Director to the SAC asking for Fast and Furious long gun information to support Demand Letter 3 (requiring gun dealers to report multiple sales of long guns).
23. February 1, 2011 e-mail from the Group Supervisor to various ATF leaders blaming Assistant U.S. Attorney for problems with Fast and Furious."

Executive Privilege:

Preceding the Committee vote on June 20, 2012, to hold AG Holder in contempt, Holder sent a letter to the President requesting the use of "executive privilege" to deny providing documents that were lawfully requested in the Congressional subpoena. Deputy Attorney General Cole's letter to Chairman Issa on June 20, 2012, informed the Committee that the President had taken the unusual, but not unprecedented, step of invoking "executive privilege" to refuse releasing the requested documents and materials.

It is particularly odd that the letter invoking "executive privilege" is actually written from the Deputy Attorney General to Chairman Issa as opposed to coming from the White House. There appears to be no public documentation of a direct request to exercise the privilege of "executive privilege" from the White House counsel's office or the President himself. This may present questions of whether executive privilege was correctly implemented here.

The Deputy Attorney General's letter explains that the reason for the President invoking "executive privilege," and the "legal basis for the President's assertion of executive privilege," is actually set forth in Attorney General Holder's letter to the President (perhaps acknowledging that the reason listed in the letter was not in fact a solid legal basis). The letter explains:

> "In brief, the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department's response to congressional oversight and related media inquiries would have significant, damaging consequences. As I explained at our meeting yesterday, it would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and

> effectively to congressional oversight. Such compelled disclosure would be inconsistent with the separation of powers established in the Constitution and would potentially create an imbalance in the relationship between these two co-equal branches of the Government."

In Attorney General Holder's letter to the President, Holder explains the doctrine of executive privilege, and essentially lays out the Administration's highly questionable legal foundation for claiming such privilege:

> "Executive privilege is 'fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.' United States v. Nixon, 418 U.S. 683,708 (1974). It is 'a necessary corollary of the executive function vested in the President by Article II of the Constitution.' Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 154 (1989) ('Congressional Requests Opinion') (opinion of Assistant Attorney General William P. Barr); see U.S. Const. art. II,A§ 1, cl. 1 ('The executive Power shall be vested in a President of the United States of America.'); U.S. Const. art. II, A§ 3 ('The President shall "take Care that the Laws be faithfully executed ….'). Indeed, executive privilege 'has been asserted by numerous Presidents from the earliest days of our Nation, and it was explicitly recognized by the Supreme Court in United States v. Nixon.' Congressional Requests Opinion, 13 Op. O.L.C. at 154."

This letter, the official document setting out the Administration's official legal basis, lacks even basic substantive legal analysis. The official document from the Administration on its legal ability to invoke "executive privilege" relies almost exclusively upon memos from the Office of Legal Counsel (OLC) and the Attorney General. The document ignores precedent from previous court decisions, the Constitution, the Federalist Papers, or from statute. This is as if to say, 'this is legal because our lawyers previously said that it's legal.'"

Attorney General Holder's letter concludes:

> "The documents at issue fit squarely within the scope of executive privilege. In connection with prior assertions of executive privilege, two Attorneys General have advised the President that documents of this kind are within the scope of executive privilege. See Letter for the President from Paul D. Clement, Solicitor General and Acting Attorney General, Re: Assertion of Executive Privilege Concerning the Dismissal and Replacement of US.

> Attorneys at 6 (June 27, 2007) ('US. Attorneys Assertion') ('[C]ommunications between the Department of Justice and the White House concerning … possible responses to congressional and media inquiries about the U.S. Attorney resignations … clearly fall within the scope of executive privilege.'); Assertion of Executive Privilege Regarding White House Counsel's Office Documents, 20 Op. O.L.C. 2, 3 (1996) ('WHCO Documents Assertion') (opinion of Attorney General Janet Reno) (concluding that '[e]xecutive privilege applies' to 'analytical material or other attorney work-product prepared by the White House Counsel's Office in response to the ongoing investigation by the Committee')."

Again here, in concluding that this situation is "squarely within the scope of executive privilege," it relies almost exclusively upon recommendations of previous Attorney Generals and OLC documents. While memos from the Office of Legal Counsel may offer sage advice for the President, they are simply one legal team's opinion. And these opinions are typically written with the intention of providing a rationale for as much latitude as possible for the President to do what they want to do –OLC memos rarely tell the President "no." As Chairman Issa's response to the President's invocation of executive privilege eloquently explains, "It is important to note that the OLC opinions provides as authorities to justify expansive views of executive privilege are inconsistent with the existing case law."

Attorney General Holder effectively concluding that this executive privilege is "squarely" within the scope of previous recommendations is not a legal argument for it in fact being within the executive privilege doctrine, a legal doctrine that is ultimately decided by the courts – and one that the courts have routinely ruled against in various situations.

Cases cited in the letter:

This is every case cited in the letter as a quotation or parenthetical:

- Executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683,708 (1974).
- The threat of compelled disclosure of confidential Executive Branch deliberative material can discourage robust and candid deliberations, for "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process." Nixon, 418 U.S. at 705.
- See Gravel v. United States, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.")'

- As the Supreme Court recognized in establishing the attorney work product doctrine, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). Were attorney work product "open to opposing counsel on mere demand," the Court explained, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial … , [a]nd the interests of the clients and the cause of justice would be poorly served." Id. at 511.
- McGrain v. Daugherty, 273 U.S. 135, 176 (1927) (congressional oversight power may be used only to "obtain information in aid of the legislative function")
- Eastland v. US. Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) ("The subject of any [congressional] inquiry always must be one on which legislation could be had.") (quotation marks omitted).
- The "only informing function" constitutionally vested in Congress "'is that of informing itself about subjects susceptible to legislation, not that of informing the public."' id. (quoting Miller v. Transamerican Press, Inc., 709 F.2d 524, 531 (9th Cir. 1983)
- Nixon v. Administrator of General Services, 433 U.S. 425,443 (1977) (congressional enactment that "disrupts the proper balance between the coordinate branches" may violate the separation of powers).
- Nixon, 418 U.S. at 707 ("[I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.")
- United States v. AT&T, 567 F.2d 121, 127, 130 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation…. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.").

The citations highlighted in red are used in the memo to justify a novel argument to protect attorney-client privilege between the President and his Attorney General. This argument has long been rejected. **The quotations used simply refer to the attorney-client privilege as if to prove that this doctrine exists, which it does, but never explaining why that would apply to the Attorney General and the President in this situation when it has never previously been held as such.**

Further, as a Washington Post blog post by Jennifer Rubin explains:

> "First, there is no attorney-client privilege that can be invoked by the president against Congress because they work for the same client, namely the American people. . . Second, no one is suggesting the documents refer to a legal analysis of the Fast and Furious program. This was about policy and public statements about the program. That's not information that would be subject to the attorney-client privilege even outside government."

The citations highlighted in blue are from *U.S. v. Nixon*, but bizarrely, the quotations used are dicta from the case, not actually binding case-law. Often in legal documents, when quotations are used from cases where the information is dicta, information not necessary to the conclusion of the case, it is denoted as dicta to ensure that it isn't given too much legal authority. In this case, quotations from the *U.S. v. Nixon* case, a case which held that the President had to turn over personal recording in the Oval Office because executive privilege did not apply, is being used to argue in favor of executive privilege in this case – without any close case comparison to explain why this case applies and is analogous.

The first *U.S. v. Nixon* quotation was, "[executive privilege is] fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution," United States v. Nixon, 418 U.S. 683,708 (1974), means very little in application here – this quotation merely says that the doctrine exists and is from the Constitution. The second *U.S. v. Nixon* quotation, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process," Nixon, 418 U.S. at 705, gives one of the primary reasons for the doctrine existing. Perhaps the only real relevant quotation from that case is the parenthetical, "[I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." Nixon, 418 U.S. at 707. How does citing such a decision in this way advance the argument that executive privilege is appropriate in this particular situation?

None of the other cases listed provide evidence that this invoking of executive privilege is "squarely within the scope of executive privilege" as Attorney General Holder concludes. The executive privilege doctrine, quite unlike the perspective given by these quotations, is not an absolute doctrine but rather a qualified doctrine.

Relevant case law:

Perhaps the most on-point case, *U.S. v. Nixon*, found that executive privilege is really meaningless in the context of potential wrongdoing. In that case the President of the United States, President Nixon, was ordered to turn over personal recordings that took place in the Oval Office – demonstrating that Congress has nearly unlimited oversight power, specifically through the use of subpoenas, in order to acquire information that relates to wrongdoing (nearly unlimited in that it's difficult to find more seemingly privileged information than recordings of the President's personal conversations).

In this case, Deputy Attorney General James Cole provided false information to Senator Grassley about an ongoing operation, there appears to be serious evidence of retaliation against the whistle-blower that provided the information to Senator Grassley, and the DOJ doubled down on their denial of an ongoing operation in a second letter. One of the primary purposes of Congress is to provide oversight of the actions of Executive branch, and that is impossible when the DOJ is allowed to provide false information with impunity about ongoing operations to the branch that oversees their actions – as it's very

difficult to oversee another branch's actions when the answers they provide contain incorrect information, perhaps in an effort to mislead or obfuscate their real activities. This behavior in any other context would likely be found to constitute "obstruction of justice."

As the federal government has continued to grow in size and scope the federal government's mismanagement has become pervasive and endemic. As a result, Congress must at least be able to utilize the narrow Constitutional tools at its disposal to acquire accurate and timely information about ongoing activities by the executive branch.

Here, in addition to providing a Senator's inquiry with incorrect information about ongoing activities, the "fast and furious" operation was out of control, and in itself constituted serious wrongdoing by the executive branch. As even Attorney General Holder has admitted, it was "fundamentally flawed." This is especially true when a smaller but similar program existed under President Bush and was shut down (choosing to re-start and expand a failed program is a question that deserves Congressional scrutiny).

Courts have held that the executive privilege doctrine is typically limited to the President and the immediate individuals around him giving him direct and candid advice – which is where Attorney General Holder's argument appears to seriously breaks down. No evidence has been presented that this reached the highest levels of the administration; this inquiry is referring to internal deliberations at the Department of Justice. One of the most on point cases, *In re Sealed Case* (D.C. Cir. 1997), held that:

> "The privilege should not extend to staff outside the White House in executive branch agencies. Instead, the privilege should apply only to communications authored or solicited and received by those members of an immediate White House staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate."

To find that executive privilege extends to internal deliberations of a federal agency would be a dangerous and unprecedented expansion of this limited doctrine – and an expansion that would likely not survive judicial scrutiny. This would be particularly dangerous as it would render effective Congressional oversight impossible.

Outside groups legal response:

In Chairman Issa's response to the President invoking executive privilege and Attorney General Holder's letter, in a letter written June 25, 2012, he explained:

> "Courts have consistently held that the assertion of the constitutionally-based executive privilege – the only privilege that ever can justify the withholding of documents

> from a congressional committee by the Executive Branch – is only applicable with respect to documents and communications that implicate the confidentiality of the President's decisions-making process, defined as those documents and communications to and from the President and his most senior advisors. Even then, it is a qualified privilege that is overcome by a showing of the committee's need for the documents."
>
> "[Y]our privilege assertion means one of two things. Either you or your most senior advisors were involved in managing Operation Fast & Furious and the fallout from it, including the false February 4, 2011 letter provided by the attorney general to the committee, or, you are asserting a presidential power that you know to be unjustified solely for the purpose of further obstructing a congressional investigation."

Speaker of the House's press secretary Michael Steel provided another rebuttal to the invoking of executive privilege in this situation:

> "As we approach Thursday's contempt vote, there is some misunderstanding and misinformation out there on executive privilege. White House Press Secretary Jay Carney and others seem to be hanging their hats on Chairman Issa's statement that there is currently no evidence that the White House was involved in the cover-up. That is exactly our point. We never, ever suggested the White House was involved. That's why it was so bizarre that the president asserted executive privilege. Executive privilege protects internal White House decision-making. True, presidents have asserted it over other executive branch documents and communications. But the courts have ruled those claims to be invalid and ordered them overturned. (See Nixon, Richard, Milhous)"
>
> "As the D.C. Circuit Court wrote in 2004 in its Judicial Watch Inc. v. Department of Justice decision, 'communications of staff outside of the White House in executive branch agencies that were not solicited and received by such White House advisors could not [be covered by executive privilege].' Also, as noted in this CRS report, the D.C. Circuit Court ruled in 1997, 'the presidential communications privilege should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decision-making by the President.'"

Todd Gaziano's blog post for Heritage provides one of the best rebuttals of the invocation of executive privilege:

> "Even if *properly* involved, the Supreme Court has made clear that executive privilege is not absolute. DOJ must provide an explanation why all those documents fit one of the recognized categories of executive privilege. It is questionable whether they all are legitimately subject to executive privilege, for several reasons."
>
> "First, the Supreme Court in *United States v. Nixon* (1974) held that executive privilege cannot be invoked at all if the purpose is to shield wrongdoing. The courts held that Nixon's purported invocation of executive privilege was illegitimate, in part, for that reason. There is reason to suspect that this might be the case in the Fast and Furious cover-up and stonewalling effort. Congress needs to get to the bottom of that question to prevent an illegal invocation of executive privilege and further abuses of power. That will require an index of the withheld documents and an explanation of why each of them is covered by executive privilege—and more."
>
> "Second, even the "deliberative process" species of executive privilege, which is reasonably broad, does not shield the ultimate decisions from congressional inquiry. Congress is entitled to at least some documents and other information that indicate who the ultimate decision maker was for this disastrous program and why these decisions were made. That information is among the most important documents that are being withheld."
>
> "Third, the Supreme Court in the *Nixon* case also held that even a proper invocation must yield to other branches' need for information in some cases. So even a proper invocation of executive privilege regarding particular documents is not final."
>
> "And lastly, the President is required when invoking executive privilege to try to accommodate the other branches' legitimate information needs in some other way."

What Would Contempt Mean?:

On February 14, 2008 the House of Representatives voted to hold White House Counsel Harriet Miers and White House Chief of Staff Josh Bolten for contempt, in relation to failures to comply with subpoenas by the House Judiciary Committee, by a vote of 223-32 (many of the Republicans walked out in protest). The issue was then referred to the Attorney General Michael B. Mukasey who declined to send the matter to a grand jury. The Committee on the Judiciary then filed a suit in the D.C. District Court, seeking civil enforcement of its subpoenas. Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 64 (D.D.C. 2008)

The court held that Miers was not immune from being compelled to testify before Congress, but could claim privilege in response to individual questions; the court also ordered Miers and Bolten to produce the non-privileged documents requested in the subpoena and a list of all documents withheld under a claim of executive privilege. Miers, 558 F. Supp. 2d at 108. Shortly thereafter, however, the court of appeals granted Miers and Bolten's motion to stay the district court order pending their appeal and denied the Committee's motion to expedite the appeal process. Comm. on the Judiciary v. Miers, 542 F. 3d 909, 911 (D.C. Cir. 2008) (holding that, even if expedited, the appeal would continue until after the end of the term of the 110th Congress, at which point the Committee would cease to be a legal entity and the suit would be rendered moot). In 2009, Miers and Bolten reached an agreement with the Committee to testify and provide documents for the investigation.

In this case, it's unlikely that the DOJ will prosecute their own Attorney General, and this may require further legal action to compel the release of documents. The Attorney General will likely invoke executive privilege in a legal case and the court will evaluate the applicability of executive privilege in this situation.

Background: On December 14, 2010, Border Patrol Agent Brian Terry, was shot and killed trying to apprehended suspected illegal aliens. The guns recovered at the scenes were part of an ongoing operation by the Department of Justice to monitor the purchasing of straw purchasers as they 'walked' across the border.

On February 4, 2011, the United States Department of justice sent a letter to Congress denying whistleblower allegations that the Justice Department had facilitated the illegal transfer of weapons to Mexican drug cartels.

On December 2, 2011, the DOJ sent Congress a new letter rescinding the previous written denial and acknowledging that Operation Fast and Furious was "fundamentally flawed."

Response to Administration Claims (some information provided by Committee)

Assertion of Executive Privilege – U.S. Attorneys Firings vs. Fast and Furious:

- The U.S. Attorney's firings case involved exerting executive privilege over the testimony of senior White House officials Harriet Miers and Josh Bolten.
- In Fast and Furious, the White House has consistently denied any involvement with Fast and Furious. So either the White House has been dishonest about its involvement, or the President has made an invalid assertion of executive privilege with documents that are far outside the accepted scope of executive privilege.

Even if Documents Are Released, They Won't Go to the Heart of Fast and Furious:

- Part of what went wrong with Fast and Furious has been the Department's poor response to accusations by whistleblowers. This included sending a false letter to Congress on February 4, 2011 that it had to withdraw ten months later.
- The Justice Department conducted its own internal examination of what occurred after February 4, 2011. This would shed light on what really happened during the operation.
- This period also covers actions that were taken to retaliate against whistleblowers – the WSJ reported that former Arizona US Attorney Dennis Burke (an Obama appointee) may face criminal charges for actions related to retaliating against a whistleblower.

DOJ has Already Provided Documents About "Gunwalking":

- DOJ has provided only a small fraction of documents – 7,600 pages out of 140,000 related to the reckless operation.
- The sheer number of pages is also irrelevant, particularly when many of the provided pages are redacted.

Fast and Furious was Simply the Fourth in a Series of "Gunwalking" Operations Begun Under the Bush Administration:

- While some of the same people involved in earlier flawed operations in Arizona participated in Fast and Furious, it was unique in its scale, its national scope, and its tragic consequences.
- The only high ranking DOJ officials in Washington who we know were told about flaws in the earlier operations, before agents blew the whistle, were actually Obama Administration DOJ officials who have apologized for not saying or doing anything to stop reckless tactics.
- This previous program, "Project Gunrunner," has been known and public since the mid-2000s. Knowing about or casting a vote in support of Gunrunner isn't the same thing as knowing about or approving Fast and Furious – something that was created years after Project Gunrunner was formed.
- Early on, some people mistakenly referred to Project Gunrunner as the effort that went wrong rather than "Operation Fast and Furious" which was funded (at least in part) by Project Gunrunner.

How Many Deaths Really Occurred because of Fast and Furious:

- We only know the names of two people whose murder has been connected to Fast and Furious: Brian Terry and Mario Gonzalez. We have anecdotes from law enforcement of other deaths in Mexico, but no names. A Mexican government official estimated the casualties from Fast and Furious amount to 150 according to the LA Times.

Relevant Documents:

Background Documents:

October 27, 2009 - E-mail correspondence providing the policy guidance to ATF
"Merely seizing firearms through interdiction will not stop firearms trafficking to Mexico."

January 8, 2010 - DOJ Briefing Paper
ATF's strategy is to "allow the transfer of firearms to continue to take place."

Source Documents:

January 27, 2011 – Letter from Sen. Grassley to ATF
Sen. Grassley asking if ATF was allowing "gunwalking" as whistleblowers had alleged

February 3, 2011 – ATF Special Agent Memo
A memo from an ATF agent in Dallas who had previously been a part of the ATF group responsible for Operation Fast and Furious.
It is known that some in ATF leadership received the memo but not known who else in ATF or the Justice Department received it. The memo should have served as a red flag to the Justice Department not to send its February 4, 2011, letter the next day. A source other than the Justice Department provided the memo to Senator Grassley long after he started asking questions. The Justice Department has never produced this memo, only making it available to view 'in camera' (you can't remove the documents) in November 2011.

February 4, 2011 - DOJ letter to Sen. Grassley
Denying Gun Walking to Mexico

May 2, 2011 – DOJ letter to Sen. Grassley
The Justice Department's response doubling down in its denials of ATF gunwalking.

May 18, 2012 - Chairman Issa letter to AG Holder
Warning for Failure to Provide Documents

December 2, 2011 – DOJ letter to Sen. Grassley
Withdrawing the DOJ's assertion that gunwalking had not taken place, ten months after its initial denial and seven months after its reiteration of the denial.

June 5, 2012 - Chairman Issa letter to AG Holder
Regarding Repeated Department Denials on Wiretap Applications

Executive Privilege Source Documents:
AG Holder Letter to President Obama
Requests invoking executive privilege

DAG Cole Letter to Chairman Issa
Notifying Chairman Issa that President Obama has invoked executive privilege

Chairman Issa's letter to President Obama
Responding to AG Holder invoking executive privilege
This letter thoroughly debunks the claim of executive privilege by President Obama.

Analysis:
CRS Report
Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure
This report examines the source of the contempt power, reviews the historical development of the early case law, outlines the statutory and common law basis for Congress's contempt power, and analyzes the procedures associated with inherent contempt, criminal contempt, and the civil enforcement of subpoenas.

Cato Article by Ilya Shapiro
Congress vs. Obama/Holder on Fast & Furious
"1. Executive privilege is a qualified, not absolute, doctrine that is meant for certain circumscribed purposes — such as to allow the president to receive candid advice from his advisers — not a blanket protection of anything in the executive branch the president wants not to be disclosed. (And it certainly can't be invoked to shield wrongdoing.) Because it is qualified, the president must identify the documents not disclosed and provide a description of the privilege asserted, what attorneys call a 'privilege log.' This has not been done here."

"2. For executive privilege to apply here, the documents at issue have to be related to something the president is involved in, most likely in this context communications to/from the president regarding the Fast & Furious policy. If Obama knew nothing about F & F, I have trouble seeing the basis for the privilege."

"3. If the president did know something, let alone have a hand in the decision making, Congress is entitled to learn at least something about it. Even when there's a sound basis for invoking executive privilege, the American people's need for information often outweighs whatever presidential interest is at issue. . ."

Heritage's Foundry Blog Post by Todd Gaziano
Fast and Furious: Executive Privilege is Illegitimate to Shield Wrongdoing
"The House Committee on Oversight and Government Reform is rightfully investigating the Fast and Furious debacle, in which the Administration allowed thousands of guns to

flow across the Mexican border, resulting in the death of one U.S. border patrol agent and at least 200 Mexican citizens—according to the Mexican attorney general. The most glaring violation of executive power in that investigation prior to today was the refusal of the Department of Justice (DOJ) to turn over 1,300 pages of documents subpoenaed by the committee without even an assertion of executive privilege. Attorney General Eric Holder simply refused on his own initiative in a blatant act of stonewalling."

Heritage's Foundry Blog Post by Brian Darling
Obama's Nixonian Contempt for Transparency

Washington Post's Blog Entry by Jennifer Rubin
How to end the Holder Stand-off: Fire him

Committee Action: Not available.

Administration Position: Deputy Attorney General Cole's letter to Chairman Issa on June 20, 2012:

> "[Information provided and internal documents show] that Department officials involved in drafting the February 4 letter turned to senior officials of components with supervisory responsibility for Operation Fast and Furious - the leadership of ATF and the U.S. Attorney's Office in Arizona - and were told in clear and definitive terms that the allegations in Ranking Member Grassley's letters were false. After the February 4 letter was sent, such assurances continued but were at odds with information being provided by Congress and the media, and the Attorney General therefore referred the matter to the Acting Inspector General for review."
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> "As the Department's review proceeded over the next several months, Department leaders publicly indicated that the facts surrounding Fast and Furious were uncertain and that the Department had significant doubts about the assertions in the February 4 letter. For example, at a House Judiciary Committee hearing on May 3, 2011, the Attorney General testified that the Department's Acting Inspector General was reviewing 'whether or not Fast and Furious was conducted in a way that' s consistent with' Department policy, stating 'that's one of the questions that we'll have to see.' The next day, May 4, 2011, in response to a question from Senator Grassley at a Senate Judiciary Committee hearing about allegations that ATF had not interdicted weapons, the Attorney General said, 'I frankly don't know. That's what the [Inspector General's] investigation . . . will tell us.' As you have acknowledged, Department staff reiterated these doubts during a briefing for Committee staff on May 5, 2011. Testifying before the Committee in June 2011, Ronald Weich, Assistant Attorney General for Legislative Affairs, acknowledged that 'obviously allegations from the A TF agents . . . have given rise to serious questions about how ATF conducted this operation.' He added that 'we're not clinging to the statements' in the February 4 letter."

"In October 2011, the Attorney General told the Committee that Fast and Furious was 'fundamentally flawed.' This statement reflected the conclusion that Department leaders had reached based on the significant effort over the prior months to understand the facts of Fast and Furious and the other Arizona-based law enforcement operations. The Attorney General reiterated this conclusion while testifying before Congress in November 2011. The Department's many public statements culminated in the formal withdrawal of the February 4 letter on December 2, 2011."

Cost to Taxpayers: None.

Does the Bill Expand the Size and Scope of the Federal Government?: The resolution decreases the scope of the federal government by exercising congressional oversight of executive abuses of power. This reasserts the checks and balances enshrined in the Constitution between the Legislative and Executive branches of the federal government.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: House resolutions are not required to have Constitutional authority statements.

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H. Res. 706 - Authorizing the Committee on Oversight and Government Reform to initiate or intervene in judicial proceedings to enforce certain subpoenas (Issa, R-CA)

Order of Business: H. Res.706 shall be considered under a closed rule which provides 20 minutes of debate equally divided and controlled by the Majority Leader and the Minority Leader. The rule also waives all points of order against consideration of the resolution.

Summary: This resolution would resolve that the Chairman of the Committee on Oversight and Government Reform is authorized to initiate or intervene in judicial proceedings in a Federal court to seek declaratory judgments affirming the duty of Attorney General Holder to comply with subpoenas "that is a subject of the resolution accompanying House Report 112-546." In other words, the Chairman could bring this matter to a court to force the Attorney General to comply with the subpoena requests.

Committee Action: This legislation was introduced on June 26, 2012, and referred to the House Committee on Rules. It was reported the House on June 27, 2012 under Rules Resolution H. Res. 708.

Administration Position: Against for same reasons as above.

Cost to Taxpayers: None.

Does the Bill Expand the Size and Scope of the Federal Government?: The resolution decreases the scope of the federal government by exercising congressional oversight of executive abuses of power. This reasserts the checks and balances enshrined in the Constitution between the Legislative and Executive branches of the federal government.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: House resolutions are not required to have Constitutional authority statements.

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